STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Judges: Servitto, P.J., and Wilder and Boonstra, JJ.
(Court of Appeals No. 323235 – 3rd Circuit Court No. 14-004589-CZ)

KEITH TODD,

Plaintiff- Appellant,

v. Supreme Court No.:153049

NBC UNIVERSAL (MSNBC),

Defendant-Appellee

and

EASTPOINTE POLICE DEPARTMENT,
And A-ONE LIMOUSINE

Defendants.

OPPOSITION TO PLAINTIFF-APPELLANT KEITH TODD'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

COUNTER-STATEMENT OF QUESTION PRESENTED

Does the unpublished Opinion of The Court of Appeals in this case applying settled principles of Michigan Law qualify as one of the rare cases that this Court should review pursuant to MCR 7.302?

Plaintiff-Appellant did not address this issue or even refer to MCR 7.302 (B).

Defendant-Appellee answers: No

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Statement of Material Facts and Proceedings set forth in the brief filed by Plaintiff-Appellant ("Todd") is selective and framed in an argumentative manner. In contrast, the Court of Appeals opinion in this case provides a thorough, accurate, and non-argumentative statement of facts and trial court proceedings as follows:

I. PERTINENT FACTS AND PROCEDURAL HISTORY

> This case arose as a result of Defendant's production and airing of an episode of a television show on its cable television channel. On August 7, 2011, defendant aired an episode of "Caught on Camera: Dash Cam Diaries 3." The episode incorrectly identified plaintiff as the perpetrator of a crime, using his name and photograph, when in fact the perpetrator was an entirely different person named Todd Keith, not Keith Todd. The episode was periodically reaired. According to Plaintiff, he became aware of it around November 15, 2013, when his uncle and friends saw and alerted him to it, and at some point he personally viewed the episode as well. The episode was re-aired on January 5, 2014. In February 4, 2014, plaintiff's counsel emailed defendant informing it of its mistake and demanding a video retraction within 14days. On February 23, 2014, defendant aired a version of the episode that correctly identified the perpetrator, and included a graphic and voice-over that stated: "When this report previously aired, we included the wrong name and photograph of the suspect. The man previously named and shown had no relation to the crime. We regret this error."
>
> On April 9, 2014 plaintiff filed a complaint against Defendant, as well as defendants Eastpointe Police Department and A-1 Limousine, alleging defamation (Count 1), intentional infliction of emotional distress (Count II), negligent infliction of emotional distress (Count III), and negligence (Count IV). (*id.*) On May 30, 2014, defendant moved for summary disposition on all claims pursuant to MCR 2.116 (C)(7) and (C)(8). Defendant alleged that Counts I through IV were time-barred by the statute of l imitations governing defamation, and furthermore, that Counts II and III failed to state a claim upon which relief could be granted. On July 3, 2014, Eastpointe Police Department moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). A-1 never answered plaintiff's complaint, although counsel for A-1 did enter an appearance after plaintiff moved for entry of a default judgment against A-1, and appeared at the summary disposition hearing, arguing orally that plaintiff's claims against A-1 were barred by the statute of limitations for defamation.
>
> On July 30, 2014, the trial court entered an order granting summary disposition in favor of all defendants on all of plaintiff's claims. The trial court held that the statute of limitations for defamation applied to all claims in the action because "all of [plaintiff's] counts really revolve around this airing of this

> one episode in 2011." Further, because the original air of the episode in question was August 7, 2011, 27 months before plaintiff filed his complaint, the court held that all of the claims were barred by the one-year statute of limitations applicable to defamation claims.
>
> On August 15, 2014, plaintiff filed with the trial court a Motion for Leave to File an Amended Compliant, and accompanying brief, and a proposed amended complaint that would have alleged false light invasion of privacy (Count I) and appropriation (Count II) against defendant. The trail court declined to hear plaintiff's motion. On August 19, 2014, plaintiff filed a timely appeal of the trial court's order granting summary disposition to defendant on plaintiff's intentional infliction of emotional distress claim, and on appeal additionally challenged the trial court's declination to consider plaintiff's motion to amend his complaint to assert additional claims.

Court of Appeals Opinion of December 10, 2015 ("COA Op") at 1-2.

The Court of Appeals went on to apply settled and controlling Michigan authority to these facts. While the Court of Appeals held that Todd's claim for Intentional Infliction of Emotional Distress was not time barred, it nonetheless affirmed dismissal because the complaint did not allege conduct that was "beyond all possible bounds of decency" or "atrocious and utterly intolerable in a civilized community." COA Op at 6. And the Court of Appeals further held that "where Plaintiff did not even seek leave to amend his complaint until after the trial court had granted summary disposition, . . . the trial court did not abuse its discretion in declining to consider the late-requested amendment." COA Op at 6. Todd's Application to this Court followed.

ARGUMENT

I. INTRODUCTION

Todd's initial Complaint alleged defamation (Count I) and a couple of tag-along claims, including Intentional Infliction of Emotional Distress (Count II) against Defendant-Appellee ("MSNBC"). The trial court dismissed all of these claims on the basis that they were barred by the applicable statute of limitations. After the trial court dismissed the case and the county clerk's office closed the file, Todd belatedly filed a motion for leave to amend his complaint. The proposed Amended Complaint relabeled the dismissed defamation claim as one for False Light Invasion of Privacy (Count I) and added a claim for "Appropriation" (Count II). In the exercise of its discretion, the trial court properly declined to hear this untimely motion.

On appeal, Todd raised two issues. First, although he abandoned all of the other claims advanced in his initial Complaint, he argued that the trial court erred in dismissing his claim for Intentional Infliction of Emotional Distress. He raised this argument even though, as the allegations of the Complaint make clear and as the Court of Appeals recognized—the broadcast in question self-evidently involved a simple mistake (which MSNBC promptly corrected when notified) and not an intentional wrongdoing, let alone an "extreme and outrageous" effort to injure someone's feelings.

Second, Todd argued that the trial court erred by not allowing him to file a new complaint. He raised this argument even though (1) the case had been dismissed and the file closed before he filed the motion seeking leave to amend; (2) the new theories he advanced in the proposed Amended Complaint were meritless and amendment would have been futile; and (3) the trial court's decision not to hear the matter was certainly well within the range of its discretion.

Unsurprisingly, the Court of Appeals rejected these arguments and affirmed the trial court decision. This was not a close case for the trial court. It was not a close case for the Court of Appeals. It is not a close case on this Application.

Four judges have heard Plaintiff's claims and decided that his case is over. Enough is enough.

II. TODDS' APPLICATION DOES NOT MEET THE STANDARD FOR REVIEW BY THIS COURT

By necessity, this Court can grant review in only a very limited number of the applications for leave to appeal that it receives[1]. It is therefore critical that this Court reserve its time, energy, and resources for the most jurisprudentially important cases. To that end, the rules of this Court mandate the following:

> [An application for leave to appeal] *must* show that
> (1) the issue involves a substantial question about the validity of a legislative act;
> (2) the issue has significant public interest and the case is one by the state or one of its subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
> (4) in an appeal before decision by the Court of Appeals,
> (a) delay in final adjudication is likely to cause substantial harm, or,
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of the state government is invalid;
> (5) in an appeal from a decision of the Court of Appeals,
> (6) (a) the decision is clearly erroneous and will cause material injustice, or

[1] *See* Shari M. Oberg, Daniel C. Brubaker, *Supreme Review Insights on the Michigan Supreme Court's Consideration of Applications for Leave to Appeal*, Mich. B.J., February 2008, at 30, 32 (noting that from 2004 to the date of the article the grant rate on applications had not exceeded two percent).

(7) (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(8) in an appeal from the Attorney Discipline Board, the decision is clearly erroneous and will cause material injustice.

MCR 7.305(B) (emphasis supplied). This case meets none of these mandatory criteria. As a civil libel action between an individual and a private entity, it does not meet (1), (2), or (6). As an unpublished opinion applying basic Michigan legal principles to the unique and idiosyncratic facts of this case it does not meet (3). As a case that has been reviewed by the Court of Appeals (which affirmed the trial court), it does not meet (4). And, because the Court of Appeals decision here does not conflict with any other decision of that court or this Court, it does not meet that part of (5).

This leaves little room for Todd, who must therefore show that the Court of Appeals decision "is clearly erroneous *and* will cause material injustice." MCR 7.302(B)(5)(b)(emphasis supplied). Todd's' Application must pass both of these tests, but, instead, it fails both.

First, the Court of Appeals opinion is not erroneous, much less clearly so. In this respect, it is worth noting that Todd faces a particularly daunting task here, especially as to his belated motion to amend, because the Court of Appeals was reviewing a trial court ruling for an abuse of discretion. Thus, as to the amendment issue Todd must show that the Court of Appeals reached a clearly erroneous decision in upholding an order of a trial court that is reviewed under the forgiving abuse of discretion standard. This he cannot do.

Second, affirming the Court of Appeals will not result in material injustice. To the contrary, the Court of Appeals decision rests on straightforward application of settled and sensible legal principles.

Accordingly, Defendant respectfully requests that the Court decline review for the basic reason that Todd's Application does not meet any of the criteria set forth in MCR 7.305(B).

III. THE COURT OF APPEALS PROPERLY FOUND THAT TODD DID NOT STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Plaintiff's Complaint Does Not Meet the Level of "Extreme and Outrageous" Conduct Required to State a Claim.

In Count II of his Complaint, Todd alleges generally that MSNBC's conduct was "intentional," and "extreme, outrageous, and of such character as not to be tolerated by a civilized society." Complaint at ¶ 5. He further alleges that MSNBC's conduct was "for an ulterior motive or purpose" and resulted in "severe and serious emotional distress." Complaint at ¶ 5. Such formulaic recitations do not, however, end the inquiry of whether a plaintiff has stated a claim for Intentional Infliction of Emotional Distress.

In order to determine whether the plaintiff has stated such a claim, the court must look at the specific conduct identified in the allegations and determine whether it meets the demanding standards of this specific tort. As this Court observed in *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 6; 374 NW2d 905, 908 (1985), "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id* (quoting Restatement (Second) of Torts, § 46, cmt. d (1965), at 72–73). The allegation of a simple error in conduct, even a very unfortunate one, obviously does not meet this standard. To the contrary, "[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Ledsinger v Burmeister*, 114 Mich App 12, 18; 318 NW2d 558, 561 (1982). (quoting Restatement (Second) of Torts, § 46, cmt. d (1965), at 73) Michigan law

recognizes that the question of whether the alleged conduct meets this standard is in the first instance one of law for the court. *See Duran v The Detroit News*, 200 Mich App 622, 630; 504 NW2d (1993).

Courts in this jurisdiction and others have consistently rejected claims for Intentional Infliction of Emotional Distress based upon the publication of news reports—even reports that the plaintiff may well have found distressing. For example, in *Duran v The Detroit News*, , the plaintiff—a former Colombian judge who had indicted the notorious drug cartel kingpin Pablo Escobar—sued over a newspaper column that revealed she was living in the Detroit metropolitan area after fleeing her country because of death threats. That the plaintiff was emotionally upset over the publication did not give her a claim for Intentional Infliction of Emotional Distress. 200 Mich App at 629–30; *see also Ruffin-Steinback v dePasse*, 82 F Supp 2d 723, 735 (ED Mich 2000) *aff'd*, 267 F3d 457 (6th Cir. 2001) (holding that errors in an NBC mini-series based on the Temptations, including inaccurate depiction of Ruffin as a "dead-beat dad," and "suggest[ion] that Earline Ruffin associated with a pimp," "cannot be considered so extreme in degree as to go beyond all possible bounds of decency.")

As the Court of Appeals recognized, the factual allegations in the Complaint do not even approach the demanding standard applicable to an Intentional Infliction of Emotional Distress claim. Accordingly, The Court of Appeals, following established Michigan authority, aptly summarized the central point: "simply stated this conduct was not beyond all possible bounds of decency" or "atrocious and utterly intolerable in a civilized community." Indeed, a contrary ruling would transform *every* dispute over a mistake into a claim for Intentional Infliction of Emotional Distress—a result supported by neither Michigan law nor common sense.

B. Todd's "Context' Argument Was Not Raised in the Trial Court or the Court of Appeals and is Waived

In his Application, Todd advances an argument that the Court of Appeals erred because it did not pay sufficient attention to "context." In all candor, MSNBC finds the argument incomprehensible. It does not matter, however, because Todd did not raise the argument before the trial court or before the Court of Appeals and has therefore waived it. Indeed, as far as MSNBC can discern, the word "context" appears nowhere in any of Todd's arguments below.

In a civil case, a party that fails to properly raise an issue in the trial court waives it on appeal. *See, e.g., Walters v Nadell*, 481 Mich 377, 387-88; 751 NW2d 431 (2008); *Johnson Family Ltd P'ship v White Pine Wireless, LLC*, 281 Mich App 364, 361; 761 NW2d 353 (2008); *In re Tyson Estate, No. 322844*, 2015 WL 9392675, at *4 (Mich. Ct. App. Dec. 22, 2015) ("It is well-settled that a litigant must preserve an issue for appellate review by raising it in the trial court.") (quoting *Walters, id.*); *Fast Air, Inc. v Knight*, 235 Mich App 541, 549; 599 NW2d 489, 493 (1999). Here, Todd's newly-asserted "context" argument was clearly not preserved for appeal.

C. Todd's Intentional Infliction of Emotional Distress is Also Barred by the First Amendment

In the trial court and in the Court of Appeals, MSNBC raised the additional argument that the First Amendment bars Todd's Intentional Infliction of Emotional Distress claim. Neither court below reached this issue. This Court need not do so, either. MSNBC raises the issue only because the relevant case law shows that Todd's Complaint was subject to dismissal on grounds the lower courts did not even have to consider.

In *Snyder v. Phelps*, 562 U.S. 443, (2011), a case involving singularly distasteful and emotionally hurtful speech, the United States Supreme Court held that the First Amendment bars claims for Intentional Infliction of Emotional Distress that are based on statements regarding

"matters of public concern" (as opposed to purely private concern). In doing so, the Supreme Court repeated its prior holdings that speech qualifies as a matter of public concern when it "'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Id*. at 453 (quoting *San Diego v Roe*, 543 US 77, 83–84 (2004))[2]. The report in question here plainly involves a matter of public concern—an arrest and the events surrounding it. Under *Snyder*, the report is therefore immune from a claim for Intentional Infliction of Emotional Distress as a matter of constitutional law.

IV. THE COURT OF APPEALS PROPERLY FOUND THAT THE TRIAL COURT HAD NOT ABUSED ITS DISCRETION IN DECLINING TO HEAR PLAINTIFF'S MOTION TO AMEND FILED AFTER THE CASE HAD BEEN DISMISSED

A. The Trial Court Acted Within Its Discretion

There is no question that the trial court had the discretion to decline to entertain Todd's belated motion for leave to amend. Todd waited some sixteen days after the trial court had dismissed his Complaint to file his Motion for Leave to File an Amended Complaint. By then, the clerk had even closed the court's file. Todd acknowledges his error in a masterpiece of understatement, "admit[ting] that the timing of his motion would have been more convenient if it had been before the trial court granted summary disposition." Application at 8.

Todd argues that the trial court was required to allow him to amend his Complaint under MCR 2.116(c)(5), but this is plainly mistaken. That provision addresses opportunities to amend

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[2] Even prior to *Snyder v Phelps*, the United States Supreme Court and lower courts had recognized the constitutional concerns raised by such claims. See *Hustler Magazine v Falwell*, 485 US 46, 56; - (1988) (holding that constitutional protections applicable to defamation claims cannot be neutralized simply by relabeling the claim as one for Intentional Infliction of Emotional Distress); see also *Cowras v Hard Copy*, 56 F Supp 2d 207, 209 (D. Conn. 1999) (quoting *Falwell*, supra) (holding that a plaintiff may not use a claim for emotional distress "to circumvent the established and carefully balanced framework of constitutional and state libel law").

when summary disposition has been granted "based on sub rule (C)(8), (9) or (10)." MCR 2.116(I)(5). Here, the trial court granted summary disposition under MCR 2.116(C)(7) on the basis that the Complaint was time-barred. The trial court did not reach the issue of whether the non-defamation claims failed to state a claim pursuant to sub rule (C)(8).

Thus while the trial court could have exercised its discretion to entertain a motion to amend, it was not clear error or an abuse of discretion for it to decline to do so. The trial court had dismissed all four of his pleaded claims as time-barred nearly three years after the subject broadcast was aired, and it had no obligation—under MCR 2.116(I)(5) or otherwise—to afford Todd a chance to come forward with new legal labels to stick on the same set of factual allegations. As the Court of Appeals reasoned:

> [W]here, as here, plaintiff did not even seek leave to amend his complaint until after the trial court had granted summary disposition, we hold that the trial court did not abuse its discretion in declining to consider the late-requested amendment. Plaintiff's motion to amend came after the case was dismissed and attempted to add two new claims based on the same conduct as had been alleged in plaintiff's initial complaint.

COA Op at 7. Indeed, a contrary rule would frustrate a trial court's compelling interests in efficiency and finality. In light of Todd's failure to include these additional claims in his initial Complaint or to seek leave to add them at any point during the period that led up to the dismissal (or even in the two weeks that followed that dismissal), it was hardly an abuse of discretion for the trial court to decline to entertain his belated motion to amend. And more to the point for purposes of Todd's present Application, it is not even conceivable that the Court of Appeals committed clear error in finding no such abuse of discretion.[3]

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[3] Todd's reliance on *Boje v Wayne County General Hospital*, 157 Mich App 700; 403 NW2d 203 (1987) as "a case similar to this one" (Application p26) does him no good. At most *Boje* stands for the unremarkable proposition that when the law governing a plaintiff's claim changes during the pendency of the case, the plaintiff should be given an opportunity to amend his complaint to conform to the new standard. That is not this case.

B. The Outcome of the Proceedings Would Not Be Changed if the Trial Court had Permitted the Amendment

Given that the trial court clearly did not abuse its discretion and the Court of Appeals was not clearly erroneous in upholding that exercise of discretion, there is no need for this Court to go any further. It is worth noting, however, that Todd certainly was not unfairly prejudiced in any way by the trial court's declination or the Court of Appeals' decision. Indeed, as the Court of Appeals recognized, Todd could not show that the outcome of the proceedings would likely have been different if the trial court had considered his motion. COA Op at 8.

Todd sought to bring two new claims in his Amended Complaint: False Light Invasion of Privacy and Appropriation. As MSNBC pointed out in its briefs below, to state a claim for false light invasion of privacy a plaintiff must allege facts from which a trier of fact could conclude that the defendant acted with actual malice or "must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." *Hanczaryk v Chapin*, No. 313278, 2014 WL 5462600, at *3 (Mich. Ct. App. Oct. 28, 2014) (citing *Detroit Free Press, Inc, v Oakland Cnty Sheriff*, 164 Mich. App. 656, 666; 418 NW2d 124 (1987)); *Early Detection Ctr, P.C. v New York Life Ins. Co*, 157 Mich. App. 618, 630; 403 NW2d 830, 835 (1986); *Sawabini v Desenberg*, 143 Mich. App. 373, 381; 372 NW2d 559, 564 (1985) (citing Restatement (Second) of Torts § 652 (1977)); see also *Battaglieri v Mackinac Ctr For Public Policy*, 261 Mich. App. 296, 304, 680 NW2d 915, 921 (2004) (defining actual malice as "knowledge that the published statement was false or as reckless disregard as to whether the statement was false or not.") (citing *Ireland v. Edwards*, 230 Mich. App. 607, 622, 584 N.W.2d 632, 640 (1998)). Reckless disregard is measured "by whether the publisher in fact entertained serious doubts concerning the truth of the statements published." *Hanczaryk*, 2014 WL 5462600, at *3 (citing *Battaglieri*, 261 Mich. App. at 304).

As discussed above, the allegations of the Complaint make clear that this case involves a mix-up between two similar sounding names, Todd Keith and Keith Todd. MSNBC made a mistake when it used Todd's name and image in the news report—one it acknowledged and promptly corrected when brought to its attention. Accordingly, the proposed Amended Complaint could not in good faith and consistent with MCR 2.118 allege that MSNBC acted with actual malice. Allowing addition of this dead-on-arrival claim would therefore have been futile.

Todd's other proposed claim fares no better. In sum, Todd wished to add a new claim for commercial misappropriation of his likeness. This claim, too, would have been dead-on-arrival because courts have uniformly held that this tort does not apply to the use of someone's name in the context of a news report.

Indeed, in the first case to rule on this tort under Michigan law, this Court emphasized that its function is to remedy unauthorized use of a person's likeness in advertising or commercial publications. *See Pallas v Crowley, Milner & Co*, 322 Mich. 411, 417, 33 NW 2d 911, 914 (1948) ("We recognize a fundamental difference between the use of a person's photograph or likeness in connection with or as a part of a legitimate news item . . . , and its commercial use in an advertisement"). This focus on advertising and commercial use has not changed, as this Court underscored in *Battaglieri*, 261 Mich. App. at 302, (holding that a defendant can be liable for appropriation only if "defendant's use of plaintiff's likeness was for a predominantly commercial purpose . . . without a redeeming public interest, news, or historical value") (internal quotation and citation omitted). The Sixth Circuit also reinforced this point in *Ruffin-Steinback v. dePasse*, 267 F.3d 457 (6th Cir. 2001), noting that appropriation of one's name or likeness for the defendant's advantage must impact the "commercial interest" in one's

identity. The use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or even in advertising that is incidental to such uses, however, does not infringe a person's rights under this tort theory. *Id*. at 461 (quoting Restatement (Third) of Unfair Competition § 47 (1995))[4].

As the Court of Appeals has observed, precluding appropriation claims based on the use of a person's likeliness in newsworthy publications is firmly rooted in First Amendment speech principles. See *Battaglieri*, 261 Mich. App. at 301 (courts have "uniformly held that the First Amendment bars appropriation liability for the use of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public concern."); see also *Rogers v. Grimaldi*, 695 F. Supp. 112, 117 (S.D.N.Y. 1988) aff'd, 875 F.2d 994 (2d Cir. 1989) (noting that matters considered to be of "public interest" or "newsworthy" have been "defined in most liberal and far reaching terms") (citing *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 448, 299 N.Y.S.2d 501, 506 (Sup. Ct. 1968).

In sum, as the Court of Appeals recognized, a different result would not have followed even if the trial court had exercised its discretion by considering Todd's motion for leave to amend. The proposed First Amended Complaint was no improvement over the initial Complaint. Todd suffered no unfair prejudice from the trial court. He was simply deprived of the opportunity to waste its time. MSNBC respectfully submits he should not be allowed to waste any more of this Court's time, either.

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[4] Michigan law in this regard is consistent with the Restatement and with authority from other jurisdictions. See Restatement (Second) of Torts, § 652C cmt. b (1977) (stating that the common form of appropriation is the use of plaintiff's name or likeness for a "commercial purpose"); *Tellado v Time-Life Books, Inc*, 643 F. Supp. 904, 911 (DNJ 1986) (stating that misappropriation of likeness is barred if the use that is not for "predominately for commercial purposes").

CONCLUSION

For the reasons stated above, MSNBC respectfully requests this Court to deny Todd's Application.

Respectfully submitted,

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